

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

March 6, 2012

The Rhode Island Ethics Commission held its 3rd meeting of 2012 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, March 6, 2012, pursuant to the notice published at the Commission Headquarters, the State House Library, and electronically with the Rhode Island Secretary of State.

The following Commissioners were present:

Ross Cheit, Chair Mark B. Heffner*

Deborah M. Cerullo SSND, Vice Chair John M. LaCross

J. William W. Harsch, Secretary John D. Lynch, Jr.

Frederick K. Butler James V. Murray**

Also present were Edmund L. Alves, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Staff Attorneys Jason Gramitt, Nicole B. DiLibero and Amy C. Stewart; and Commission Investigators Steven T. Cross, Peter J. Mancini and Gary V. Petrarca.

At 9:02 a.m. the Chair opened the meeting. The first order of

business was a motion to approve minutes of the Open Session held on February 14, 2012. Upon motion made by Commissioner Harsch and duly seconded by Commissioner LaCross, it was unanimously

VOTED: To approve the minutes of the Open Session held on February 14, 2012.

ABSTENTION: John D. Lynch, Jr.

The next order of business was advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of:

Joseph J. Iacoi, a member of the Westerly Licensing Board, a municipal appointed position, requesting an advisory opinion regarding whether he may participate in the Licensing Board's consideration of a motel license renewal, given that the applicant's ex-husband filed an Ethics Commission Complaint against the Petitioner in 1994.

*** Commissioner Heffner arrived at 9:12 a.m.**

**** Commissioner Butler arrived at 9:13 a.m.**

Staff Attorney Stewart presented the Commission Staff

recommendation. The Petitioner was present. In response to Chair Cheit, Staff Attorney Stewart explained that the absence of an “independent relational or financial nexus” meant that there was no other connection between the Petitioner and the motel license applicant other than the license renewal before his Board. Chair Cheit stated that the issue here is non-economic. He stated that he agreed with the outcome given that the Ethics Commission Complaint was filed a long time ago and that the Petitioner has no memory of it.

In response to Commissioner Cerullo, Staff Attorney Stewart stated that her reference to “personal interest” was not meant to include bias as an interest in something. Rather, she stated that the Code looks for conflicts that are objective, such as a financial, familial or business interests. Chair Cheit noted that the Code does not prohibit personal grudges where there is no evidence of an economic relationship. In response to Commissioner Cerullo, the Petitioner stated that he could review this license application without bias against the applicant. Upon motion made by Commissioner Murray and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Joseph J. Iacoi, a member of the Westerly Licensing Board.

The next advisory opinion was that of:

Peter D. Ruggiero, Esq., the Town Solicitor for the Town of

Charlestown, on behalf of the Charlestown Town Council, a municipal elected body, requesting an advisory opinion as to whether and how the Town Council may consider and vote on matters pertaining to a lawsuit against the Town of Charlestown and certain individuals, given that conflicts of interest prevent the Town Council from achieving a necessary quorum of three (3) members.

Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. In response to Chair Cheit, the Petitioner informed that the Commission issued advisory opinions to Ms. Frank and Mr. Avedisian in August 2011, regarding Ms. DiBello's charge of discrimination before the Rhode Island Commission for Human Rights. The Petitioner stated that it is possible that Ms. Frank and Mr. Avedisian could be found to be personally liable if their conduct was outside the scope of their employment. He stated that it is uncommon but he has seen public officials held individually liable in other cases.

In response to Commissioner Cerullo, Staff Attorney Stewart stated that the advisory opinion selects which person should participate based upon a review of prior minutes related to the passage of Advisory Opinion 2008-9. She stated that the determination of which conflicted member would participate was made after consulting Ms. DiBello's thirty-five page complaint and discussing the matter with the Petitioner.

Commissioner Heffner inquired about the actual financial exposure of both conflicted Town Council members, given the provisions for indemnification and the rare occasion that their conduct is found outside the scope of their employment. He stated that he did not see a direct financial loss resulting from their participation in Town Council matters related to DiBello's lawsuit, at this time. Commissioner Harsch opined that the two conflicted members are in the same position and he disfavors picking one over the other to participate. The Petitioner stated that absent advice from the Commission, he has been unable to discuss the lawsuit with the Town Council. He said that they need a quorum to discuss, for example, the substance of the answer, affirmative defenses, and whether or not to counterclaim.

Commissioner Harsch stated that he believes both Ms. Frank and Mr. Avedisian should be able to participate. Chair Cheit agreed and noted that they both signed affidavits averring that they could participate fairly and objectively. Commissioner Butler noted that Mr. Avedisian could have greater difficulty participating in Town Council matters if he became actively involved in the lawsuit, given that there are more allegations made against him than Ms. Frank.

In response to Chair Cheit, Staff Attorney Stewart explained that the Staff can amend the draft opinion to allow both Ms. Frank and Mr. Avedisian to participate and noted that it was necessary to provide guidance to the Town Council given the contentious nature of this

lawsuit. Chair Cheit stated that if there was a specific vote that would have a monetary impact upon either conflicted member then they should seek further advice from the Commission. Commissioner Butler agreed with Chair Cheit and noted that if one felt uncomfortable in the future, they could always recuse. The Petitioner stated that he did not object to continuing this matter to the next meeting and said that the Town Council will not meet before then. Commissioner Hefner asked the Staff to remove the sentences regarding which member has more of a conflict. Chair Cheit directed the Staff to amend the advisory opinion so that both conflicted members could participate at this time. Chair Cheit continued the advisory opinion to the next meeting, at which time the Commission would consider an amended version.

The final advisory opinion was that of:

David Holmes, a member of the Tiverton Planning Board, a municipal appointed position, requesting an advisory opinion as to whether he may participate and vote on the Tiverton Planning Board's consideration of proposed zoning changes in the Village Commercial District, given his public comments on the matter prior to his appointment.

Staff Attorney Stewart presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner LaCross, Staff Attorney Stewart stated that the

Planning Board is engaging in a legislative activity and therefore, the Petitioner's prior statements do not trigger recusal because legislators regularly make statements about pending legislation. Upon motion made by Commissioner Butler and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to David Holmes, a member of the Tiverton Planning Board.

At approximately 9:42 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Murray, it was unanimously

VOTED: To go into Executive Session, to wit:

a) Motion to approve minutes of Executive Session held on February 14, 2012, pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4).

b) Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission et al., C.A. No. PC 11-6938, pursuant to R.I. Gen. Laws § 42-46-5(a)(2).

The Commission reconvened in Open Session at approximately 9:44 a.m. The next order of business was a motion to seal the minutes of the March 6, 2012 Executive Session. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Lynch, it was unanimously

VOTED: To seal the minutes of the March 6, 2012 Executive Session.

Chair Cheit reported that the Commission took the following actions in Executive Session: 1) unanimously voted to approve the minutes of the Executive Session held on February 14, 2012; and 2) had no discussion of the litigation matter, Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission et al., C.A. No. PC 11-6938.

The next order of business was a Commission review of possible exceptions to Regulation 5002. Staff Attorney Gramitt stated that there are three versions of Regulation 5002 before the Commission today. Option 1 takes into consideration the Commission's comments from the last meeting. Option 2 is the same as Option 1, except that instead of being automatic, the exceptions may be applied by the Commission via an advisory opinion. Option 3 is a copy of the draft considered at the last meeting.

Staff Attorney Gramitt began by describing the changes to subsection (b)(1). He stated that it would apply when an affiliated person is before a public official's state or municipal agency as a duly authorized member or employee of another state or municipal agency, to participate in non-adversarial information sharing or coordination of activities. He explained that the word "appears" was deleted based upon the Commission's concern that it connotes

adversarial representation, such as a lawyer appearing on behalf of a client. He added that there is a safety valve which provides that the exception only applies if this affiliated person is not otherwise a party or participant, and has no personal financial interest in the matter under discussion.

In response to Chair Cheit, Staff Attorney Gramitt stated that if the Commission adopts Option 1, people will still likely come to the Commission for advisory opinions, but it will not be necessary for someone to do so. Chair Cheit questioned whether if under Option 2, the failure to seek an advisory opinion could subject a public official to a complaint. Staff Attorney Gramitt replied that it was conceivable, similar to section 5(e)'s hardship exception. He stated that was a reason why he did not favor Option 2. Chair Cheit agreed.

Staff Attorney Gramitt described the changes to subsection (b)(2), which is a type of public forum exception. He stated that he added to lines 23 and 24 the language "during a period when public comment is allowed." He also noted that the safety valve here at the end is identical to the one in subsection (b)(1). He summarized that this exception allows an affiliated person to speak when public comment is allowed, provided that all other members of the public have an equal opportunity to comment, and that the affiliated person is not a party or participant and has no financial interest in the matter under discussion.

Commissioner Butler stated that he prefers Option 1. Chair Cheit agreed and noted that these exceptions cover some situations where the person subject to the Code may not consider that an advisory opinion is necessary and the situations occur infrequently. Commissioner Cerullo also stated that she favored Option 1. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To direct the Staff to start rulemaking for Regulation 5002, Option 1.

The next order of business was a Legislative Update. Staff Attorney Gramitt explained that he monitors bills in the General Assembly to determine if they have any impact on the Commission. In the past, at the direction of the Commission, he has appeared at House or Senate Committee meetings to support, oppose, or simply provide background information regarding proposed legislation. He stated that there are currently two separate House and Senate versions of a ballot referendum to restore Commission jurisdiction over core legislative acts, which was removed by the Irons case. He stated that these bills are sponsored by Representative Marcello and Senator O'Neill respectively.

Staff Attorney Gramitt described the Senate's two primary concerns with restoring jurisdiction over core legislative acts. The first, he stated, is whether the Commission is subject to the Separation of

Powers constitutional amendment. The second, he stated, is that returning jurisdiction to the Commission will give it full authority to legislate and adjudicate violations of the Code. The Commission currently has full legislative authority but cannot adjudicate violations alleged against members of the General Assembly related to core legislative acts. Staff Attorney Gramitt informed that the Commission's position in the past has been that it is not opining as to whether its jurisdiction should be expanded; rather the Commission's position is that the public should be permitted to vote on the issue.

The next order of business was the Director's Report. Executive Director Willever informed that there are 9 complaints (5 of which are non-filing), 1 advisory opinion, and 1 litigation matter pending and that 2 APRA requests have been fulfilled since the last meeting. He informed that there may be a probable cause hearing at the next meeting. He added that a cover story on the Advisory Opinion issued to the Mayor of Pawtucket, Donald R. Grebien, appeared in a recent edition of Rhode Island Lawyers Weekly.

The next order of Business was New Business. There being no New Business, at 10:15 a.m., upon motion made by Commissioner LaCross and duly seconded by Commissioner Butler, it was unanimously

VOTED: To adjourn.

submitted,

Respectfully

Harsch

J. William W.

Secretary